

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

6 UNITED STATES OF AMERICA, . CASE NO. 1:09-CR-30-1  
7 Plaintiff, .  
8 - v - . *Sentencing*  
9 CHRISTOPHER FREEMAN, . Monday, September 14, 2009  
10 . 3:10 p.m.  
11 Defendant. . Cincinnati, Ohio

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MICHAEL R. BARRETT

## P R O C E E D I N G S

2                   COURTROOM DEPUTY: The next matter on the docket is  
3 District Court Case Number 1:09-CR-30, Defendant Number 1:  
4 *United States of America versus Christopher Freeman.*

5 We're here this afternoon for sentencing.

6 THE COURT: All right. Would counsel like to state  
7 their appearances for the record, please.

8 MR. OAKLEY: Good afternoon, Your Honor. Tim Oakley  
9 for the United States.

10 THE COURT: Good afternoon, Mr. Oakley.

11 MR. SMITH-MONAHAN: Richard Smith-Monahan on behalf  
12 of the defendant, Christopher Freeman.

13 THE COURT: And you're Mr. Freeman, correct?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Okay. You want to take your hands out of  
16 your pockets, please.

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Thank you.

19 All right. Let's talk about how we got here.

20 On May 11th of this year, Mr. Freeman appeared before me  
21 in the United States District Court for the Southern District  
22 of Ohio. He entered a plea to the indictment pursuant to a  
23 Plea Agreement. The matter was referred to the Probation  
24 Department for a presentence investigation and report, which  
25 the Court received. The report was initially prepared on June

1       8th of 2009 and revised about a month ago on August 19th,  
2       2009. There was also a Sentencing Memorandum, which has been  
3       supplied.

4           Mr. Oakley, have you received a copy of all the documents  
5       in this case?

6           MR. OAKLEY: I have, Your Honor. Thank you.

7           THE COURT: Mr. Smith-Monahan, have you received a  
8       copy of all the documents in this case?

9           MR. SMITH-MONAHAN: Yes, Your Honor. Judge, you did  
10       get a copy, I assume, of the treatment report from Northland?

11           THE COURT: Yeah, I did. I'm looking for it right  
12       now.

13           Does Barb have that?

14           COURTROOM DEPUTY: Judge, I'll just give you my copy.

15           THE COURT: Okay.

16           Hang on one second, guys.

17           Did you get a copy of that, Mr. Oakley?

18           MR. OAKLEY: Your Honor, I did, and Mr. Smith-Monahan  
19       has handed me another copy just now.

20           THE COURT: Richard, just so you know, I received a  
21       copy of that, and I've discussed it with the Probation  
22       Department. The Probation Department expressed that the  
23       author of the report -- how do I put this? -- is a straight  
24       shooter and has done good work in the past.

25           MR. SMITH-MONAHAN: Yes, sir. I've spoken with both

1 of them. He has two counselors up there. The one you got a  
2 report from was his individual counselor. He also has a group  
3 counselor.

4 THE DEFENDANT: Yeah.

5 MR. SMITH-MONAHAN: And I've spoken with him.

6 THE COURT: All right. Before I address the factual  
7 findings for the sentence, I'd like to review something we  
8 talked about at the time of the plea, and I just want to  
9 review this for the record.

10 Under the Sentencing Reform Act of 1984, the United States  
11 Sentencing Commission issued guidelines. At that time,  
12 federal judges were required to follow those guidelines in  
13 determining sentences in criminal cases. Due to Supreme Court  
14 decisions since that time, the Court has said that it's  
15 unconstitutional for judges to be required to follow the  
16 guidelines in sentencing, but that it was constitutional for  
17 the judges to be required to consider the guidelines as one of  
18 the factors in determining a sentence, which I have and will  
19 do along with the factors discussed in 18 U.S.C. 3553.

20 The Court has the authority to impose a sentence which  
21 could be more or less severe than that suggested by the  
22 guidelines, and the sentence is determined by the standard of  
23 reasonableness and the minimum and maximum penalties provided  
24 by the Code for the offense of conviction.

25 In terms of sentencing facts, Richard, is there anything

1 other than what's in the report that you wish to bring up at  
2 this time?

3 MR. SMITH-MONAHAN: We have nothing other than what  
4 was raised in our objection letter and our Sentencing  
5 Memorandum, Your Honor.

6 THE COURT: Okay. And review the objection letter  
7 for me.

8 MR. SMITH-MONAHAN: And the objection letter is also  
9 the subject of the Sentencing Memorandum, but it's an  
10 objection to the four-level enhancement applied by Probation  
11 under the guidelines for basically selling or trafficking in  
12 firearms.

13 THE COURT: Okay. We'll cover that in just a minute  
14 then.

15 Mr. Oakley, is there anything else you wish to present at  
16 this time?

17 MR. OAKLEY: We may present some testimony that would  
18 correspond with the facts in the PSR, but nothing else right  
19 now.

20 THE COURT: Okay. Reserving the objections until we  
21 talk about it in a few moments, the Court -- as it relates to  
22 the factual statements contained in the presentence  
23 investigation, we'll adopt those factual statements as the  
24 Court's findings of fact, including that Mr. Freeman entered a  
25 valid plea to Count One of the indictment and was and is

1 adjudged guilty in Case Number 1-09-CR-30-1, Possession of  
2 Stolen Firearms, a Class C felony, which is a violation of  
3 18 U.S.C. 922(j) and 924(a)(2) and 2, which subjects him to up  
4 to ten years of possible imprisonment, a \$250,000 fine, three  
5 years of supervised release, a \$100 special assessment.

6 Because of the dates of this offense, the 2008 edition of  
7 the Guidelines Manual was used to calculate the offense level  
8 and the guideline imprisonment range.

9 The guideline for a violation of 18 U.S.C. 922(j) is found  
10 at Sentencing Guideline 2K2.2.1. Pursuant to 2K2.1(a)(7), the  
11 base offense level is 12 if he has not previously been  
12 convicted of a felony offense and all the stolen firearms were  
13 handguns.

14 Pursuant to 2K2.1(b)(1)(C), the offense level is increased  
15 by four levels if the offense involved the defendant's  
16 possession of 36 stolen firearms, because the offense involved  
17 36 firearms.

18 2K2.1(b)(4)(A) deals with a two-level adjustment for  
19 possessing -- excuse me. A two-point adjustment under  
20 2K2.1(b)(4)(A) is not an appropriate enhancement in this case  
21 because the underlying offense is a violation of 922(j), and  
22 the base offense level takes into account that the firearms  
23 that were stolen pursuant to Note 8(A) under Guidelines 2K2.1.

24 Under 2K2.1(b)(5), if there was trafficking of firearms  
25 involved, there was an increase by four levels.

1       In this case, Mr. Freeman was responsible for stealing 36  
2 firearms on at least four separate occasions: one in  
3 Sardinia, where he sold the guns to his cousin and his uncle;  
4 one in Avondale, where he and Mr. Roehm bartered and sold guns  
5 to a drug dealer; eight guns were given to Mr. Roehm, and  
6 those were to be sold eventually to an undercover agent;  
7 Mr. Freeman engaged with Mr. Roehm in presenting three guns to  
8 an undercover agent, also to be sold.

9       So he participated in transporting, transferring and  
10 disposal of two or more firearms to another individual.

11      Based upon these transactions, the four-level enhancement  
12 applies in this case.

13      According to 2K2.1(b)(6), if he used or possessed any  
14 firearm or ammunition in connection with another felony or if  
15 he possessed or transferred any firearm or ammunition with the  
16 knowledge or intent or reason to believe that it would be used  
17 or possessed in connection with another felony, there is a  
18 potential increase by four levels.

19      And I think, Richard, that's where your objection speaks;  
20 is that correct? That's the basis of your objection?

21      MR. SMITH-MONAHAN: Our objection is to Paragraph 40  
22 and 41, really, where Probation concluded that the four-level  
23 enhancement for trafficking in firearms is appropriate.

24      THE COURT: Okay. Why don't you speak to your  
25 objection now.

1                   MR. SMITH-MONAHAN: Okay. This guideline section  
2 2K2.1(b) (5) provides for a four-level enhancement if the  
3 defendant trafficked in firearms, which, you know, means  
4 selling the guns.

5                   THE COURT: Right.

6                   MR. SMITH-MONAHAN: And our position is that  
7 Mr. Freeman was obviously convicted of selling the guns. That  
8 was the charge in the indictment. It was for possession and  
9 disposing of the firearms. So we submit under the cases cited  
10 in the Sentencing Memorandum, *United States versus Gibson*,  
11 *United States versus Farrow*, *United States versus Duckro*, all  
12 Sixth Circuit cases that where "the same" -- and this is a  
13 quote from the Court in *Gibson*:

14                  Where "the same aspect of a defendant's conduct factors  
15 into his sentence in two separate ways," that constitutes  
16 impermissible double counting.

17                  In this case, obviously, the sale of the stolen firearms  
18 was an element of the offense for which Mr. Freeman was  
19 charged. In other words, had it gone to trial, the government  
20 would have had to prove as an element of the offense that he  
21 sold firearms. So when he enters a plea of guilty to that  
22 count, he is necessarily -- that conduct is encompassed within  
23 the count of conviction, selling firearms.

24                  Mr. Freeman is not separately a convicted felon. There is  
25 no separate reason to -- I point to the example of Mr. Roehm,

1 who was the co-defendant, who was a convicted felon. His  
2 possession of firearms in and of itself is a felon.

3 But in regards to Mr. Freeman, it's this statute that he  
4 is charged under. The possession and the disposition of  
5 stolen firearms is what made his conduct illegal and, thus,  
6 what drives his base offense level under the guidelines of an  
7 offense level of 12.

8 Obviously, I didn't see Mr. Roehm's Presentence Report,  
9 but I would speculate he had a higher Base Offense Level  
10 because his possession of firearms was independently an  
11 offense. He is a prohibited person. Mr. Freeman was not.

12 So it's solely his conviction. It's solely the selling of  
13 the firearms, the conviction itself, which is what drives him  
14 to this offense level of 12.

15 Therefore, we believe, because of that fact, that counting  
16 again the fact that he sold the firearms and giving him a  
17 four-level enhancement for it is double-counting under these  
18 circumstances, and it's unfair. You know, it's his sale of  
19 the firearms that got him in trouble. It calculates that the  
20 -- the basis for the computation of the guideline, and then to  
21 stack on another four levels because he sold the same firearms  
22 seems unfair. We would think it submits under this concept of  
23 punishing the same aspect of this conduct twice.

24 So we ask the Court to consider an -- although that is  
25 what the guidelines say, under the Sixth Circuit case law we

1 would submit that it's impermissible double counting.

2 I think two of the Sixth Circuit cases are strong indicia  
3 -- the holdings in two of those cases are strong indicia that  
4 this is double counting. One is that *Gibson* case. It was  
5 kind of an odd statute, but it was prosecuting mine operators.  
6 They are prosecuted and they are given -- they are mine  
7 operators and that's the basis, one of the elements of the  
8 offense, they'll also get a leadership enhancement. The Sixth  
9 Circuit said no, the fact that they were the operators of the  
10 mine is what permitted the prosecution. That was an element  
11 of the offense they were charged with. Therefore, you can't  
12 also stack on a leadership enhancement because but for them  
13 being mine operators, they wouldn't have been prosecuted.

14 Similarly, the *Farrow* case, the defendant is charged with  
15 felonious assault-type offense, an assault-type offense for  
16 assaulting a federal officer with a vehicle, so that's the  
17 basis for the conviction. He also gets a big enhancement for  
18 using a vehicle or using a "dangerous weapon" to commit the  
19 offense. So he is convicted for the conduct, and he's given  
20 enhancement for the same conduct. The Sixth Circuit said no  
21 in *Farrow*, that's impermissible double counting.

22 We would submit that the circumstances in this case are  
23 factually indistinguishable from those two cases. Here you  
24 have a defendant convicted of selling firearms, and then you  
25 turn around and you give him a four-level enhancement for

1 selling firearms.

2 Under the circumstances of this case, we would submit that  
3 that four-level enhancement is not appropriate.

4 We believe the correct guideline computation of 12 plus 6  
5 is 18, minus 3 for acceptance of responsibility is 15.

6 THE COURT: I think Mr. Oakley's memorandum in  
7 response correctly dealt with the mine case in *Eversole*. I  
8 think under 2K2.1(b) (6), if Mr. Freeman used or possessed any  
9 firearm or ammunition in connection with another felony, or  
10 possessed or transferred any firearm or ammunition with  
11 knowledge or intent or reason to believe that it would be used  
12 or possessed in connection with another felony, there is an  
13 increase of four levels.

14 I know you disagree with some of reasoning, but the fact  
15 of the matter is the firearms were obtained by the breaking  
16 and entering into the Antiques Gun Store on February 11th,  
17 2009. I think that that conduct in and of itself constitutes  
18 a separate felony type of offense, and I believe that the  
19 counting done by the Probation Department in this case was  
20 appropriate.

21 So the objection will be overruled.

22 Mr. Oakley, I didn't really give you a chance to respond,  
23 so if you want to -- if you think anything else needs to be  
24 said for the record, you could make that argument now.

25 MR. OAKLEY: Your Honor, if I could. First, I

1 believe the statute can be -- or Mr. Freeman could have been  
2 convicted for receiving stolen firearms or possessing stolen  
3 firearms also, and that's what the evidence would have been.  
4 I don't believe it necessarily has to be disposing of stolen  
5 firearms.

6 But, second of all, Your Honor, in looking at the *Eversol*  
7 case, where separate enhancements "penalize distinct aspects"  
8 of a defendant's conduct, no double-counting will be involved.

9 As it's noted, he gets a 12-point base offense for  
10 possession of stolen firearms, and then there is an additional  
11 four-level enhancement for the trafficking because the  
12 trafficking creates a distinct aspect with its own separate  
13 harms. I think that's the key to double counting.

14 When Mr. Freeman was out, not only did he burglarize the  
15 arcade or the antique store with the firearms, but in his  
16 trafficking the weapons, these weapons are being transmitted  
17 to drug dealers, drug users, and are now, at this point,  
18 untraceable. It's a pretty dangerous situation to society at  
19 large and to anyone, including officers, who now come into  
20 contact with these people because they are armed with weapons  
21 that cannot be traced back to the source of where they came  
22 from.

23 I think that's what the guideline enhancement is about.  
24 We think the enhancement is appropriate, and we appreciate the  
25 Court's finding.

1                   THE COURT: And I agree with Mr. Oakley's comments on  
2 that.

3                   Richard, if you want to -- so the objection will be  
4 overruled. If you want to further supplement the record, you  
5 can, or if you think you've got it covered --

6                   MR. SMITH-MONAHAN: Well, I just wanted to -- you  
7 mentioned 2K2.1(b)(6), and my reading of the Presentence  
8 Report is, Probation did not give Mr. Freeman an enhancement  
9 under 2K2.1(b)(6) for possessing the firearm in relation to  
10 another felon. Probation concluded that enhancement was not  
11 appropriate. The government did not object to that finding.

12                  THE COURT: I think it's under 2K2.1(b)(5) where the  
13 enhancement occurs; is that correct?

14                  MR. SMITH-MONAHAN: That's where Probation -- when  
15 you responded to me earlier, you mentioned the next  
16 enhancement, which Probation did not actually score, nor did I  
17 when I was arguing -- -

18                  THE COURT: I may have misspoken on that.

19                  MR. SMITH-MONAHAN: So just in response to what  
20 Mr. Oakley said about 2K2.1(b)(5), which -- so I've been clear  
21 on the record, is paragraphs 39, 40 and 41 of the Presentence  
22 Report.

23                  THE COURT: 42 was the section I was talking about.

24                  MR. SMITH-MONAHAN: Right.

25                  THE COURT: So I misspoke on that, and you're

1 correct.

2 MR. SMITH-MONAHAN: Mr. Oakley mentioned the  
3 burglary, and I want to say this:

4 We haven't disputed any of those facts. What we're  
5 disputing is, he wasn't charged with burglary.

6 If we were standing here and this prosecution were  
7 burglary with firearms and he were getting a four-level  
8 enhancement for selling firearms, we would not be making this  
9 argument because the burglary would not have been considered  
10 already in the underlying charge.

11 But he was not even charged with the burglary of firearms.  
12 The indictment charged him only with the possession -- it's  
13 possession, receipt and disposition of the firearms, or sale  
14 of the firearms. That's all the indictment charged him with.

15 So I, frankly, think any discussion about the burglary in  
16 regard to this point is irrelevant because he wasn't charged  
17 with it. If he were charged with it, I wouldn't be making  
18 this argument.

19 The point is, this sale of the firearms -- look at the  
20 Statement of Facts in this case. All it talks about is  
21 selling firearms, the Statement of Facts attached to the Plea  
22 Agreement. That's what he pled guilty to, is the Statement of  
23 Facts they read. It talks only about the sale of firearms,  
24 and that is what he is getting a four-level enhancement for.  
25 That is what he pled guilty to. That is what the indictment

1 charged. Therefore, we would submit that that is double  
2 counting under these circumstances.

3 THE COURT: I'm satisfied that the record on the  
4 objection that I've overruled is sufficient.

5 But, Mr. Oakley, if you think anything else needs to be  
6 added, you may.

7 MR. OAKLEY: Not at this point, Your Honor, no.

8 THE COURT: Okay.

9 There was no adjustment for role in the offense because he  
10 was neither a leader nor a minor participant. He was held  
11 accountable for his own behavior in the case.

12 Acceptance of responsibility, he has been given a  
13 two-level reduction and the additional one-point reduction.  
14 His criminal history is only one point, so he has a Criminal  
15 History Category of Roman Numeral I.

16 Term of supervised release following a term of  
17 imprisonment would be up to three years, including mandatory  
18 conditions regarding not violating any other federal, state or  
19 local crimes, collection of DNA, and not using controlled  
20 substances, and testing to ensure those provisions.

21 Maximum fine, I've already said, is \$250,000. There is  
22 always a \$100 mandatory assessment in this case.

23 So those are the way the guideline recommendations shake  
24 out, which would be -- excuse me?

25 (Mr. Smith-Monahan confers privately with the defendant.)

1                   THE COURT: An offense level of 19 with a Criminal  
2 History Category of I, and the guideline provision is 30 to 37  
3 months. As you know, Richard, there has been a request for an  
4 upward departure based upon conduct.

5                   So other than the objections already stated, anything as  
6 to the calculation of the guidelines?

7                   MR. SMITH-MONAHAN: No, Your Honor, nothing more  
8 about the calculation of the guidelines.

9                   THE COURT: Okay. Is there anything that you or your  
10 client wishes to say in respect to mitigation of the potential  
11 sentence?

12                  MR. SMITH-MONAHAN: Yes, Your Honor.

13                  THE COURT: Go ahead.

14                  MR. SMITH-MONAHAN: We have -- the second part of the  
15 Sentencing Memorandum, we objected to the upward departure and  
16 grouped that together with a discussion about request for a  
17 variance below the recommended guideline range. So, if I may,  
18 I'll just address those as one consideration. I think it's,  
19 at this point, a determination of the 3553 factors.

20                  Obviously, the Court knows, Mr. Freeman is Criminal  
21 History Category I. He comes into this case with a few minor  
22 skirmishes with the law. This is his first adult felony  
23 conviction. He stands before the Court, under the guidelines,  
24 as someone that presents a low likelihood of recidivism based  
25 on the Commission's view of individuals, lowest criminal

1 history category possible.

2 He's only 21 years old. That's obviously a very young  
3 age. He has been an adult for three years, and it's a very  
4 impressionable age, and it's an age which is probably really  
5 critical what happens here forward and what the rest of his  
6 life looks like.

7 Prison can have two different effects on people. As I'm  
8 sure the Court knows, one of those effects is teaching --  
9 getting someone around a bunch of hardened criminals where  
10 they learn a lot of negative things. That's something that  
11 prison can do, and that's something that the sentence we are  
12 proposing, that we are hoping to try to keep him away from  
13 that influence.

14 I know there has been some factual argument back and forth  
15 between the government and I about the influence Mr. Freeman  
16 was subjected to in his life. I know you sentenced Mr. Roehm  
17 this morning, but you can see some of the comments from my  
18 client's father in the Presentence Report. I pointed those  
19 out in the Sentencing Memo, that co-defendant Roehm and his  
20 gang that they hang with were some of what got Mr. Freeman  
21 going down the wrong path in his using drugs, being involved  
22 in criminal activity. That was a lot of the basis for the  
23 fight between my client and his father, is my client's father  
24 seeing that this is a bad influence for him and he needs to  
25 keep him away from these people. But he was hanging around

1 with him and, sure enough, here he is in trouble.

2       He has got, as you know, a heroin addiction. That is --  
3 no bias. I think he has made some pretty candid admissions in  
4 this case about trading guns for drugs, using -- you know,  
5 selling guns to have money to buy drugs. He was high at the  
6 time he did this, and he was using heroin pretty heavily. I  
7 know we all know that heroin is a highly addictive drug, and  
8 he appears to have been firmly in its grasp at the time he did  
9 this.

10      And I realize that's an argument that cuts two ways. The  
11 last thing you want is people out there is high on drugs  
12 committing crimes.

13      Now we can look at what Mr. Freeman is doing to try to  
14 deal with that problem. Admittedly, it is part of the  
15 underlying problem. That why he's in trouble today. Because  
16 he is using drugs illegally, he is needing to feed that habit,  
17 and he chose to make some really, really bad decisions  
18 surrounding that.

19      You let him out on bond at the time of his plea hearing.  
20 He had two options on what he could do at that point: he  
21 could go back and use, or he can really try to clean his life  
22 up.

23      I think if you've looked at what's happened, sure, it  
24 hasn't been perfect. You know, it hasn't been perfect, but I  
25 think he's really shown you that he's tried.

1           I know when I first met him at the jail, he was coming  
2 down and detoxing from heroin sitting in the county jail.  
3 That was hard. He was a complete mess. That's where he came  
4 from: first the detox in the jail and now trying to get back  
5 out really into the same world he was living in but be  
6 drug-free.

7           And I'm going to let his dad talk in a few minutes. I  
8 know you heard from him at the plea hearing about how hard  
9 that is on him and how hard it's been and then how committed  
10 they are to keeping him from doing that again.

11          But look as what he's doing. He has been on house arrest  
12 since the day you let him out. He is still on house arrest as  
13 we stand here today, so he's spent four months now on house  
14 arrest. He has been engaged in treatment at Northland. I  
15 think I gave Mr. Oakley my only report, the only copy of that  
16 report, but look at what it says in here.

17          "Excellent progress so far" is what this counselor  
18 indicated. He attends twice weekly at the treatment program.  
19 This is on the bottom of Page 1. "Mr. Freeman started  
20 attending intensive out-patient program June 15th and has made  
21 excellent progress thus far."

22          In the second page, "In review of Mr. Freeman's progress,  
23 he completed a thorough first step assignment and was able to  
24 acknowledge his powerlessness and unmanageability to his drug  
25 addiction, verbalized sincere recognition of his legal

1 problems, and sees how his drug addiction has placed in  
2 criminal behavior."

3 It's given him some opportunity to attend AA and NA  
4 meetings that were -- as he could get them approved on his  
5 electronic monitoring. "Patient reports having good  
6 experience with attendance at NA meetings."

7 He's had a little bit of trouble finding employment. Some  
8 of that has been being on house arrest. Then when you go to  
9 do a job interview, Pretrial has got to call the employer.  
10 You can imagine how hard it is to get an employer to hire you  
11 in that situation.

12 This current situation, as of today -- he could have  
13 started today but for court. So he thinks they've got a  
14 placement for him at L3 starting next Monday, so he would be  
15 working and continuing his treatment.

16 You see that the treatment specialist there suggests that  
17 they can continue these services with him at this facility.  
18 They have extended continuing care monitoring for up to a year  
19 with his program. I know that the Court sometimes is  
20 concerned about disrupting something that's going on. I think  
21 Mr. Freeman is standing before you with something that's going  
22 on that's good.

23 I know it is a huge chance when a defendant stands up in a  
24 case like this and asks for a big break, Your Honor, and we  
25 realize some of the facts of this case are disturbing to the

1 Court. I want to talk about that in a minute.

2 We have a defendant with a minimal record, a drug  
3 addiction that we can see is probably pretty clearly the cause  
4 of why he is here, being involved with a crowd of people that  
5 got him into this type of conduct, so he's a guy to take a  
6 chance on. He's 21 years old. He's young and has a chance  
7 not to go to prison and learn some negative things. He has  
8 shown you how serious he is about rehabilitation.

9 I want to just comment on the facts of the case because I  
10 know that Mr. Oakley is going to talk a lot about them and I  
11 know they are a big concern to the Court. We're not here  
12 disputing the facts. We're not here to tell you he didn't do  
13 this. He did it. He was really wrong. He is confessing that  
14 he was wrong.

15 You know, I know there is a concern about the incident  
16 with the planned robbery. I wanted to point this out to the  
17 Court, that that's what my client told the agents that upon  
18 his arrest. It's my belief from having read the paperwork  
19 that's how they found out about that, is he told them, "Hey,  
20 you know, I was planning on robbing him. I didn't know he was  
21 an agent." He didn't do it, you know. In one sense, the  
22 upward departure and these kinds of things are really  
23 punishing him for what he was thinking and planning on doing  
24 but didn't act on.

25 So, you know, he was honest about it and has been honest

1 from the time of his arrest about that. He was very candid.  
2 Now he is obviously subjected to punishment for his honesty.  
3 But, at the very least, he is a gentleman who has been  
4 forthright and he's a gentleman trying his best now to deal  
5 with the problem that got him where he is standing.

6 With all of those circumstances, I know your guideline  
7 range is 30 to 37 months. You have discretion to go down as  
8 low as you want. There is nothing mandatory in this case. We  
9 ask you to exercise that discretion and go down substantially  
10 in this case.

11 Yes, Judge.

12 THE COURT: There is one other item that you may want  
13 to comment on before we move on. This morning in the  
14 sentencing of the co-defendant, Mr. Whitley, who was the owner  
15 of the firearms store, was present. I believe you have been  
16 given a copy of the transcript which occurred at that time,  
17 but for purposes of this sentencing I'm going to read what I  
18 believe was the relevant portion.

19 This is Mr. Whitley starting on Line 19.

20 MR. SMITH-MONAHAN: Which page, Judge? I'm sorry.

21 THE COURT: Page 2.

22 "I am a federal firearms licensed dealer, and I have a  
23 list of damages and any articles that were stolen out of my  
24 building. The total is over \$30,000. I had no insurance  
25 because I had a small break-in a year before, and I went ahead

1 and installed steel bars around all the windows and the doors,  
2 and I had a backup battery security system.

3 This particular night on February 12th, the electric was  
4 out in Bethel from a storm. I had a backup satellite in case  
5 this happened. That particular night, the Russian satellite  
6 and the American satellite crashed in outer space. We had no  
7 security from 2:30 to 5:30 in the morning, and that's when the  
8 break-in occurred, sometime between 2:30 and 5:30 in the  
9 morning."

10 Did we give Richard a copy of that list?

11 COURTROOM DEPUTY: No, we did not.

12 THE COURT: He provided us a list which had the  
13 damages to his shop and also had a listing of the firearms  
14 that were taken which Mr. Oakley had indicated he would be  
15 able to check off some of those firearms as being recovered.

16 So do you wish to -- in your mitigation, do you wish to  
17 discuss restitution as well?

18 MR. SMITH-MONAHAN: Well, we're not getting -- this  
19 is the first I had seen of those dollar amounts. I don't  
20 believe we are going --

21 THE COURT: Actually, I think the presentence  
22 investigation had it listed the 27,000, didn't it?

23 MR. OAKLEY: Yes, with the recovery of almost 8,000.

24 MR. SMITH-MONAHAN: We're not going to dispute what  
25 the Court wants to order in restitution that it deems fair.

1 Mr. Freeman is willing to make every effort, once he is  
2 employed, to try to make recompense for his wrongs here. We  
3 have no intention of disputing -- if the man said he's lost  
4 money and that's verified through the Probation Department and  
5 the Court, we're not going to dispute him paying that back.

6 Obviously, a long period of incarceration would hinder his  
7 effort to try and do that, but he is standing here with every  
8 intention of trying to make good on the damage he did. That's  
9 what we'll say in that regard.

10 I had finished what I intended to say. I believe my  
11 client's father would like to say a few words to the Court, if  
12 you'll permit him to do so.

13 THE COURT: Certainly.

14 How you doing? Could you state your full name and spell  
15 your last name so the court reporter can take it down.

16 MR. THOMAS P. FREEMAN: Thomas P. Freeman,  
17 F-r-e-e-m-a-n.

18 THE COURT: Go ahead, Mr. Freeman.

19 MR. THOMAS P. FREEMAN: Sir, I'd just like to say  
20 that my son did do a grave consequence. He's got to be  
21 accountable for his actions. But, you know, he's just -- he  
22 is 21 years old. He's a young man. I just -- I think after  
23 talking with my son since he is on his, since he was released,  
24 that, in my honest opinion, he was just at the wrong place at  
25 the wrong time with the wrong crowd.

1       I just feel as a parent -- I just want to say that  
2 everything that I've read and everything that I've just looked  
3 into, that the statistics are pointing at when a person goes  
4 to prison, especially a young person, the odds are just really  
5 high that they are going to be led into a more criminal  
6 activity because of being with the criminal element.

7       I'm just hoping, Your Honor, you could show a little bit  
8 of leniency, give him a chance to do what's right. I think  
9 that he's more than willing to show the Court is he is wanting  
10 to do what's right.

11      Again, I'd like to just add, sir, that I'm just -- I would  
12 like for you to show a little bit of leniency.

13      THE COURT: And I appreciate your efforts in regard  
14 to your son's conduct before. Thank you.

15      MR. THOMAS P. FREEMAN: Thank you, sir.

16      MR. SMITH-MONAHAN: Do you want to say something?

17      THE COURT: Mr. Freeman want to talk to me?

18      MR. SMITH-MONAHAN: He has a few comments, Your  
19 Honor.

20      THE DEFENDANT: Yes. I don't know. I ain't never  
21 been in trouble before. I ain't never went to jail. I got --

22      THE COURT: Those are two separate things,  
23 Mr. Freeman. You have been in trouble before, but you've  
24 never been to jail.

25      THE DEFENDANT: Yeah, I ain't never been to jail

1 before. Like I say, I did three months in Butler County, you  
2 know. That's probably what scares me the most, is going back  
3 to jail.

4 The time I was out on bond, you know, I had a lot of time  
5 to think about how it affected me and my family. But I'm not  
6 disputing anything on what you give me because I accept the  
7 responsibility. I can't fight what I did wrong, you know.  
8 Can't put it off on no one else.

9 If you would show some lenience, I'd appreciate it.

10 I have been clean since then and going to continue doing  
11 my Northland and drug treatment. I don't want to live that  
12 life no more.

13 That's all I got to say. Thank you.

14 THE COURT: Thank you.

15 Mr. Oakley, do you have anything you want to say at this  
16 time?

17 MR. OAKLEY: Your Honor, I guess if there is no real  
18 dispute about the facts other than who committed the burglary,  
19 we don't need to put on any evidence, I don't think. In  
20 looking at the PSI, if there is no dispute, then there is no  
21 dispute that Mr. Roehm is the one who received all the money  
22 for the stolen weapons. He is the one who got paid.

23 Mr. -- I'm sorry. Mr. Freeman is the one that got all the  
24 money. Mr. Freeman paid Mr. Roehm \$80. So to make some type  
25 of allegation that Mr. Roehm was the driving force behind

1 this, I think, misspeaks of the facts.

2 Second of all, Your Honor, the robbery, in paragraph 28,  
3 wasn't because Mr. Freeman changed his mind; it was because he  
4 couldn't get into the trailer where the shotgun was located.  
5 Otherwise, we would have been here -- hopefully not, but we  
6 would have been here on entirely different circumstances with  
7 different charges.

8 This is an operation that was conceived, driven and  
9 benefitted by Christopher Freeman.

10 I know he's a young man, I know he doesn't have much of a  
11 criminal history; but thanks to him, 20-plus guns are still  
12 out on the streets of Cincinnati and throughout Southwest  
13 Ohio. The Court should take that into consideration when it  
14 considers the nature of the offense and the risk to society  
15 that Mr. Freeman has caused, not to mention the damage that he  
16 did to Mr. Whitley in burglarizing his store.

17 We think the guidelines are appropriate, and we also think  
18 that the recommendation of the upward departure based on the  
19 overall operation led by Mr. Freeman is appropriate. We would  
20 ask the Court to give him, at a minimum, the 37 months. If  
21 the Court is so inclined, we would agree with an upward  
22 departure from that.

23 THE COURT: Well, the sentence I'm about to impose,  
24 in my judgment, takes into consideration the nature and  
25 circumstances of this particular offense and, Mr. Freeman,

1 reflects seriousness of the offense, promotes respect for the  
2 law, and will provide just punishment as well as afford  
3 adequate deterrence to any additional criminal conduct that  
4 Mr. Freeman may have contemplated or with others similarly  
5 situated may have contemplated.

6 It will protect the public from further crimes and provide  
7 him with needed educational or vocational training.

8 I appreciate what Mr. Freeman, Senior tried to do in this  
9 particular matter, and I appreciate the supervision he tried  
10 to give his son earlier. But to be clear and fair, at the  
11 time that I let Mr. Freeman out on bond, I obviously had a  
12 copy of Mr. Roehm's record but not a Presentence  
13 Investigation. I had a copy of Mr. Freeman's record but not a  
14 Presentence Investigation.

15 At that time, I was willing to listen to the fact that the  
16 young heroin addict was influenced by the older, allegedly  
17 more mature heroin addict. In looking at the comparative  
18 records, it seemed to make sense.

19 Since that time, I think I've come to conclude that  
20 Mr. Freeman was actually the person that schemed to break into  
21 the gun shop and steal the firearms. As a juvenile, he broke  
22 into a car, stole a stereo, and also stole some rims and tires  
23 at different times.

24 As indicated by Mr. Oakley, he controlled the flow of the  
25 stolen firearms for sale and bargained for drugs for the time

1 that this offense lasted. Both Mr. Freeman and Mr. Roehm went  
2 into Avondale, sold guns to unidentified heroin dealers in  
3 exchange for drugs.

4 When I do the sentence in this case, I need to look at  
5 what I've given Mr. Roehm in terms of fairness. I've taken  
6 his record into consideration.

7 But also, Mr. Freeman, and Richard can tell you and Tim  
8 Oakley can tell you that at least on a weekly basis that  
9 people like the folks you sold your guns to come in front of  
10 me, and they start looking at five or plus years just out of  
11 the gate for having the guns, and you're the guy that's giving  
12 them the guns.

13 That's a concern, not just because of the fact that the  
14 City of Cincinnati and the surrounding area is heavily engaged  
15 in Project Disarm to get the guns off the street, but in terms  
16 of just understanding the flow of guns and how these things  
17 get into the hands of these known felons, I think it's  
18 important, but also the number of guns that are still  
19 unaccounted for, the number of guns that you put into  
20 circulation I think is important in this case.

21 Even though you were high on drugs, the fact of the matter  
22 is -- and Richard said that you gave up the evidence that led  
23 the probation officer to conclude that you were going to rob  
24 the undercover agent. But, as Mr. Oakley pointed out, you  
25 were going to rob the undercover agent, you had trouble

1 getting to the shotgun that you were going to use to rob this  
2 guy.

3 You have an armed, high robber come in contact with an  
4 armed undercover agent, there is no telling what would have  
5 happened. That's part of the reason we are tough on the  
6 criminals that come in here just carrying guns. You know,  
7 they say they're carrying them for their own protection, but,  
8 more often than not, innocent people get involved in their  
9 criminal conduct.

10 5K2.0(a)(2)(B) permits a departure in cases where there is  
11 circumstances the Sentencing Commission does not identify but  
12 is nevertheless appropriate, and I think this is such a case.  
13 Short of a locked door, I think we would have had a very  
14 serious confrontation there. I think that that's something I  
15 need to take into consideration in this case, plus the types  
16 of sentences that I give people for possessing firearms in  
17 these situations, and also Mr. Roehm --

18 What did I give him, Tim, 67 months?

19 MR. OAKLEY: 67 months, yes.

20 THE COURT: I gave him a more severe sentence based  
21 upon his record, but I'm not sure, Christopher, who was  
22 leading who down the path in this situation. The evidence  
23 points, to me, that actually you were leading him down -- the  
24 younger junkie was leading the older junkie down the path in  
25 this case. I think that the upward departure is warranted in

1 this case.

2       For that reason and what I've stated in the record, I am  
3 going to impose a sentence of 43 months to the Bureau of  
4 Prisons, three years of supervised release upon completion of  
5 the sentence.

6       Upon release from incarceration, you are ordered to report  
7 in person to a probation office in the district within which  
8 you released, and you have to do that within 72 hours.

9       As I indicated before, the conditions are:

10      You are not to commit any other federal, state or local  
11 crimes;

12      Never to possess any firearms or other dangerous devices;

13      Not to possess any illegal controlled substances; and to  
14 monitor assurance of that, within 15 days upon your release of  
15 supervised release, you'll have at least one drug test and at  
16 least two thereafter, but more can be administered;

17      You have to comply with the standard conditions of  
18 probation as adopted by the Courts for the Southern District.

19      There will be -- I'm not going to have a fine in this  
20 case, but I am going to order restitution in the amount of --

21      Bob, do you have the number handy? It was 27 --

22      MR. FROMMEYER: Your Honor, if I could speak to the  
23 restitution issue?

24      THE COURT: Go ahead.

25      MR. FROMMEYER: I'm not sure the Court can order

1 restitution in this case, and the reason is, is because what  
2 he was charged with was possession and disposing of the  
3 firearms. Restitution is held to the count of conviction.  
4 What the property that was alleged in the indictment in Count  
5 One was the firearms that were actually part of the  
6 transactions with the undercover agent.

7 All of those firearms were recovered and, therefore, I'm  
8 not sure the Court can order restitution based upon the  
9 burglary and all that because that is not part of the charge  
10 and the conduct.

11 THE COURT: Mr. Oakley, do you have an opinion on  
12 that?

13 MR. OAKLEY: Your Honor, I don't. This is new to me.  
14 I would have thought that the relevant conduct would be such  
15 that the restitution would be appropriate.

16 THE COURT: Well, here's what I'm going to do. I'm  
17 going to order a condition of supervised release that  
18 restitution in the amount of \$27,000 minus the guns that have  
19 been recovered, and I'm assuming -- I'm not assuming. I'm  
20 hoping that more firearms will be recovered over the next few  
21 months, that those will all be credited toward Mr. Freeman's  
22 account.

23 What we can do is, the Probation Department, when it's  
24 time to put together a schedule, we can see what firearms have  
25 been recovered, what firearms haven't, and then deal with it

1 as a condition of supervised release at that time.

2 Obviously, if I'm wrong on this, Richard has heard your  
3 argument and he can take it up and get that straightened out.

4 Richard, is there a request for the 500-hour drug  
5 treatment?

6 MR. SMITH-MONAHAN: Yes, Your Honor.

7 THE COURT: Okay. That's granted.

8 Mr. Freeman is ordered to provide Probation with a DNA  
9 sample and pay the special assessment of \$100.

10 Paragraph 14 of the Plea Agreement, I think, dealt with  
11 forfeiture, so any items that are mentioned in there to be  
12 forfeited will, in fact, be forfeited.

13 Richard, do you want to renew your previously-raised  
14 objections for the record?

15 MR. SMITH-MONAHAN: Yes, Your Honor, I will.

16 Pursuant to the Sixth Circuit's decision in *Bostic*, first  
17 of all, we would renew our objection to the four-level  
18 guideline enhancement under Section 2K2.1(b) (5), and I would  
19 incorporate all of the reasons that we indicated earlier in  
20 the hearing that we felt that a four-level enhancement was  
21 inappropriate. We believe the correct guideline computation  
22 should be 18 to 24 months.

23 Second, we would object to the Court's determination that  
24 an upward departure is appropriate and the Court's denial of a  
25 downward variance in this case. We would submit that the

1 Court should balance the seriousness of the offense that the  
2 Court mentioned against some of the factors that we raised:  
3 my clients's age; his drug problem that led him into the  
4 problems he was engaged in; his rehabilitative efforts; his  
5 efforts of drug treatment; his lack of a criminal record.

6 We would submit when making that balancing of the 3553,  
7 that the downward variance -- at least a sentence within the  
8 guideline range or, failing additionally, a downward variance  
9 in the guideline range was actually appropriate in this case.

10 THE COURT: Mr. Oakley, do you think you need  
11 anything regarding those on the record at this point?

12 MR. OAKLEY: No, Your Honor.

13 THE COURT: Okay. Where are we in terms of custodial  
14 status, guys?

15 MR. SMITH-MONAHAN: We would request -- I believe  
16 Pretrial has submitted a bond report to you which indicates  
17 they have no objection to him remaining out on bond. We would  
18 ask that you allow him to continue to do so. If you were  
19 inclined to agree with that, I had the additional request of  
20 allowing him to be off of house arrest awaiting his  
21 designation to Bureau of Prisons.

22 I spoke with Mr. Morris from Pretrial about that.  
23 Mr. Morris indicated to me they have no objection to him being  
24 off of house arrest while awaiting his voluntary surrender.

25 THE COURT: Tim?

1                   MR. OAKLEY: Your Honor, I just spoke to Mr. Morris.  
2 Maybe there was a miscommunication, but Mr. Morris informed me  
3 that the reason that Mr. Freeman has done as well as he has  
4 was the electronic monitoring and would, I believe, oppose the  
5 removal from that condition. It doesn't hinder Mr. Freeman  
6 from going to work. He can notify the Probation Department  
7 and then make the scheduling arrangements. You know, if the  
8 Court makes it final today, we would have no objection to the  
9 bond being continued.

10                  We would also be curious as to two questions: One, if we  
11 can return the weapons we do have back to Mr. Whitley. I  
12 believe the case is concluded to the point where we can return  
13 the evidence, if no objection from Mr. Smith-Monahan and the  
14 Court.

15                  Second is, we were curious if Mr. Freeman was asking for a  
16 location nearest his home.

17                  THE COURT: We'll get to those in just a second.  
18 Let's deal with the middle issue first.

19                  Richard, if, in fact, photographs containing serial  
20 numbers of the aforesaid firearms were saved and preserved in  
21 case something would happen somewhere on appeal, are you okay  
22 with the return of the weapons?

23                  MR. SMITH-MONAHAN: We have no objection.

24                  THE COURT: Okay. So I'll order --

25                  Tim, just for file purposes, if you could record serial

1 numbers and photographs of the weapons and keep those safe,  
2 that would be fine. The actual weapons themselves, those  
3 could be returned.

4 The defendant is a candidate for voluntary surrender, so  
5 I'll allow him to do that.

6 I think you owe me an entry of dismissal, don't you, Tim?

7 MR. OAKLEY: No. It was just the one count.

8 THE COURT: Just one-count indictment, all right.

9 And in terms of -- well, the 500-hour drug treatment, and  
10 I'm assuming as close to home as possible?

11 MR. SMITH-MONAHAN: Yes, sir.

12 THE COURT: And designation, Barb, as close to home  
13 as possible.

14 Both sides are notified that they can appeal the sentence.

15 If you are indigent and cannot retain a lawyer,  
16 Mr. Freeman, you may apply and one will be appointed to  
17 represent you on appeal.

18 Pursuant to Rule 4(b) of the Rules of Appellate Procedure,  
19 any Notice of Appeal must be filed with the Clerk of Courts  
20 within ten days.

21 Richard, do you want us to go ahead and journalize that  
22 now or not?

23 MR. SMITH-MONAHAN: Yes, Your Honor.

24 THE COURT: All right.

25 Barb, will you take care of that?

1 COURTROOM DEPUTY: There will be an appeal?

2 THE COURT: There will be an appeal, so will you take  
3 care of docketing a notice?

4 | COURTROOM DEPUTY: Yes.

5 THE COURT: Anything else at this time, guys?

6 MR. OAKLEY: Not from the United States.

7 MR. SMITH-MONAHAN: What did you decide on house  
8 arrest, Judge?

9                   THE COURT: Oh, excuse me. Good point. He can  
10 report as designated when the Bureau of Prisons notifies him,  
11 but he is to continue on the same terms and conditions that he  
12 has previously been under.

13 MR. SMITH-MONAHAN: Thank you, Your Honor.

14 MR. OAKLEY: Thank you, Your Honor.

15 THE COURT: Thank you.

16                   COURTROOM DEPUTY: This court is in recess for five  
17 minutes.

18 (The proceedings concluded at 4:00 p.m.)

**C E R T I F I C A T E**

20 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM  
21 THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

23 S/MARYANN T. MAFFIA, RDR

24 Official Court Reporter